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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

) No. P1300CR20081339

) Div. 6

) MOTION TO DISMISS WITH
) PREJUDICE

) UNDER SEAL

22 Steven DeMocker, by and through counsel, hereby respectfully moves this Court
23 to dismiss the charges against him with prejudice. This position is based on the due
24 process clause, the Sixth Amendment, the Eighth Amendment and Arizona
25 counterparts, Arizona Rules of Evidence, Rules of Professional Conduct, Arizona Rules
26 of Criminal Procedure and the following Memorandum of Points and Authorities.

SUPERIOR COURT
2010 JUL 16 AM 9:08
JEANNE HICKS, CLERK
S. KELBAUGH
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MEMORANDUM OF POINTS AND AUTHORITIES

Mr. DeMocker was indicted in October of 2008. Trial commenced with jury selection on May 4, 2010. Judge Lindberg fell ill suddenly on June 17, 2010. Judge Darrow was appointed to make a Rule 19.5 determination on July 2, 2010. On July 9, jurors indicated a willingness to proceed with a trial that might last through October 2010.

Also on July 9, three months after the trial commenced, the State indicated for the first time that it intended to call Mr. DeMocker's counsel, John Sears, to testify about the issue of the Hartford Life Insurance policies. The Court ordered the parties to simultaneously file their positions on the Hartford Life Insurance issues at noon on July 12. The defense filed its position as ordered, which is incorporated herein. The State did not file its position. Instead, the State filed under seal a Motion for Determination of Counsel with Chronology of Events and Exhibits.¹ On July 13, this Court set a hearing on July 14 to address these issues. The Court provisionally denied the State's Motion contingent upon four questions posed to the defense. A hearing is set for July 16 to resolve this and other issues pursuant to Arizona Rule of Criminal Procedure 19.5

I. The State's Wrongful Attempt To Interfere with Mr. DeMocker's Right to Counsel of Choice

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ...to have the Assistance of Counsel for his defense." The Supreme Court has held that this includes the right to the defendant's counsel of choice. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006), citing *Wheat*, 486 U.S. at 159. "We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." *Id.* This right does not arise from the right to a fair trial, but rather, "a particular guarantee of

¹ At the same time, the State filed copies of these pleadings in the Superior Court probate case assigned to Judge Mackey, as attachments to a document styled "Notice of Irregularities".

1 fairness to be provided-to wit, that the accused be defended by the counsel he believes
2 to be best.” *Id.* at 146. A violation of the right to counsel of choice is a structural error
3 that requires reversal. See *Gonzalez-Lopez*, 548 U.S. at 150. This is so because the
4 right to counsel of choice implicates “myriad aspects of representation” and “bears
5 directly on the ‘framework within which the trial proceeds...’” *Id.* at 50, citing *Arizona*
6 *v. Fulminate*, 499 U.S. 279, 310 (1991).

7 The State has attempted to interfere with Mr. DeMocker’s right to counsel from
8 the outset of this prosecution. [REDACTED]

9 [REDACTED]
10 [REDACTED] The State then attempted to make Mr. Sears a
11 witness at trial relating to Mr. DeMocker’s state of mind. The Court promptly denied
12 the State’s attempt. January 13, 2010 Transcript (Under Seal.) On July 1, after Judge
13 Lindberg fell ill, the State again attempted to make John Sears a witness to the “voice in
14 the vent” in the middle of trial. The State did not notice Mr. Sears as a witness on June
15 3 when it now says Judge Lindberg’s order made Mr. Sears’ testimony relevant. Again,
16 on July 9, the State identified John Sears as a witness in open court regarding the
17 Hartford Insurance issues. On July 12, the State filed a motion to determine counsel
18 making wild, defamatory and unsupported accusations of criminal conduct, violations of
19 the Code of Professional Conduct and a fraud on the court. The State’s motion for
20 determination of counsel alleges that there is reasonable suspicion to believe that
21 violations of “the Arizona Rules of Professional Conduct, breaches of fiduciary duty to
22 interested parties, theft of trust funds, fraud on Yavapai County and/or money
23 laundering have possibly occurred and that counsel for Defendant may have benefited
24 and/or participated in these violations.” (State’s Motion, page 2). This Motion, with
25 these unprecedented accusations, was as we said above, hand delivered to Judge
26 Mackey along with a document the State titilatingly styled “Notice of Irregularities.”
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1 The State alleged that Mr. DeMocker, aided by his lawyers, "looted" the estate of
2 Carol Kennedy, that they did so with the complicit aid of his daughters, Renee Girard,
3 his parents, and almost anyone else who might be heard to speak favorably of Steve
4 DeMocker. The State made the following accusations at that hearing, "[a]nd yet he
5 [Mr. DeMocker] manages to manipulate, with some assistance from counsel, where he
6 gets the payments of those proceeds. They are - \$700,000 of those proceeds are paid
7 for his benefit. And he's got this plan in place, and he's made his lawyers a part of his
8 plan." (Page 25:23-26:3) Further, "[t]he State maintains that he had that plan in place
9 before that [the murder]. And we believe that there will be evidence in trial that
10 demonstrates that this is just a continuation of his plan to murder Carol Kennedy, get
11 payment of her insurance proceeds, get ride of her alimony problems, etc. *And he*
12 *manipulates his counsel into assisting him to get those proceeds.*" (page 26: 7-13). And
13 on and on, "[a]nd then on top of that, on the same day he signs the resignation of
14 Katherine DeMocker document and acceptance by Renee Girard – that is July 10 of
15 2009 – on that same day he signs it because Mr. Sears presents it to him that day, that's
16 the day he's in here with counsel on an ex parte hearing to determine his indigency.
17 And that day is the day that his indigency is determined. And shortly thereafter Yavapai
18 County steps up to the plate and starts paying apparently huge bills for Mr. DeMocker'
19 case. Even though he and his counsel are knowing at that point in time that he's going
20 to be receiving \$700,000 in life insurance proceeds through a shell game" (26:14-
21 27:4). And even further inflammatory "[t]hrough a shell game maneuvering through
22 accounts to get paid back to counsel John Sears and Osborn Maledon." (27:4-6). "And
23 in this particular case, defense counsel have, basically, gotten in bed with Mr.
24 DeMocker and helped him do what he had set out to do prior to the time of the
25 homicide. Now I'm not saying that they intentionally did that. They were manipulated
26 into doing that. And I think they had the blinders on." (30:1-7). In a crescendo
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1 moment, “[i]n terms of a family being in crisis, I would grant the Court, sure this is a
2 family in crisis. But that doesn’t give rise to the looting of the estate of the victim in
3 this case, the looting of her testamentary trust without court approval to do that.” (64:4-
4 9).... “And the something wrong, obviously it just gets worse. Because the proceeds
5 end up going directly to the defendant contrary to Mr. Sear’s opening statement.”
6 (64:20-23). The Court provisionally denied the State’s Motion on July 14.

7 The State’s attempts to interfere with Mr. DeMocker’s right to counsel could not
8 be more clear or consistent. As the Supreme Court noted in *Wheat*, the Petitioner in
9 *Wheat* “of course rightly points out that the Government may seek to “manufacture” a
10 conflict in order to prevent a defendant from having a particularly able defense counsel
11 at his side; but trial courts are undoubtedly aware of this possibility, and must take it
12 into consideration along with all of the other factors which inform this sort of a
13 decision.” *Id.* at 163. (considering a government manufactured conflict when
14 determining whether a conflict exists between a client and counsel). There can be no
15 doubt about the strategic importance the State attaches to accusations. For instance,
16 when the State asks Judge Mackey to seal the State’s crazed “Notice of Irregularities”, it
17 urges the Court to seal the document “due to content that could affect the outcome of
18 the State v DeMocker trial, if they are made public.” Indeed.

19 **II. The State’s Deliberate Attempt to Create a Mistrial**

20 The State’s attempt to interfere with Mr. DeMocker’s right to counsel must be
21 seen in light of the State’s other misconduct in this case. The misconduct ranges from
22 misstatements and omissions to the first grand jury, resulting in a remand by the Court;
23 late disclosure of thousands of documents, witnesses and experts, previously sanctioned
24 by the court; the filing of a frivolous motion to disqualify the Court to avoid the Court’s
25 evidentiary rulings which was promptly denied by Judge Brutinel; the filing of a
26 frivolous Special Action during jury selection, where jurisdiction was denied by the
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1 Court of Appeals; the filing of a motion for sanctions, later withdrawn, against victims'
2 counsel Chris Dupont; the late dismissal of the death penalty after death qualifying a
3 jury of 40 people, at great expense to the Court, the parties and the County; the public
4 filing of documents making unfounded allegations about the source of Mr. DeMocker's
5 legal fees; violations of Court orders regarding biological evidence, sanctioned by the
6 Court; the destruction of biological evidence, also sanctioned by the Court. All of this
7 behavior and other misconduct occurred before Judge Lindberg became ill on June 17.

8 After Judge Lindberg's illness, the State has done everything in its power to
9 delay the resumption of this trial with this jury and create a mistrial. First, the State
10 rejected thirteen of eighteen proposed judges and proposed no judges to resume the trial.
11 Second, the State, even though it was aware of the facts as stated in John Sears' opening
12 on June 3, waited until July 1 to inform the Court and parties, in violation of 15.6, that it
13 had additional disclosure. Third, the State disclosed over 1100 pages of late disclosure,
14 the discovery of which was only delayed by the State's lack of due diligence and which
15 was available to the State since 2008. Fourth, the State late disclosed, on July 9, that it
16 intended to call John Sears as a witness as to the Hartford Insurance issues. Fifth, the
17 State improperly inquired as to the substance of *ex parte* under seal orders of the Court.
18 Sixth, the State, after 7 days of presenting its case-in-chief, announced for the first time
19 that it would need 25 days to complete its case-in-chief, creating a trial two months
20 longer than proposed during voir dire and through and including the first 8 days of trial.
21 Seventh, on July 12, the State filed this motion to determine counsel, ignoring the
22 Court's order to file its position on the Hartford Insurance issues, and making wild,
23 unsupported accusations against counsel. Finally, to punctuate its attack on the
24 relationship between Mr. DeMocker and his lawyers, the State files its Notice of
25 Irregularities with Judge Mackey's Court. This pattern of misconduct can only be seen
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1 as a series of attempts to interfere with Mr. DeMocker's right to counsel of his choice
2 and to create a mistrial.

3 The State made public its allegations against Mr. DeMocker and his counsel in a
4 way designed to infect the jury as well. In open Court on July 9, 2010, the State alleged
5 publically that Mr. DeMocker benefited from Ms. Kennedy's life insurance policy by
6 payment of attorneys fees from this money. See July 9, 2010 Prescott Courier article.
7 The State also made public false statements and accusations about the payment of Mr.
8 DeMocker's attorneys fees by Yavapai County taxpayers. See *Id.* The only purpose for
9 making these accusations public was to inflame and infect this small community.

10
11 **III. The Court Should Dismiss the Charges Against Mr. DeMocker with**
12 **Prejudice**

13 In *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), the
14 United States Supreme Court plurality opinion held that:

15 the circumstances under which ... a defendant may invoke the bar of
16 double jeopardy in a second effort to try him are limited to those cases in
17 which the conduct giving rise to the successful motion for a mistrial was
intended to provoke the defendant into moving for a mistrial.

18 *Id.* at 2091. The plurality believed that:

19 a standard that examines the intent of the prosecutor, though certainly not
20 entirely free from practical difficulties, is a manageable standard to apply.
21 It merely calls for the court to make a finding of fact. Inferring the
22 existence or nonexistence of intent from objective facts and circumstances
is a familiar process in our criminal justice system.

23 *Id.* at 2089.

24 "Arizona case law is to the same effect as the federal cases in holding that
25 intentional judicial or prosecutorial overreaching designed to cause a mistrial will result
26 in a bar to any further prosecution." *Pool v. Superior Court in and for Pima County*,
27 139 Ariz. 98, 106 (1984) citing *State v. Marquez*, 113 Ariz. 540, 542, 558 P.2d 692, 694

1 (1977). In *State v. Wilson*, 134 Ariz. 551, 554, 658 P.2d 204, 207 (App.1982), the court
2 of appeals stated that the Arizona standard concerned the prosecutor's "motive" to
3 provoke a mistrial. Article 2, Section 10, of the Arizona Constitution, the double
4 jeopardy clause, forbids retrial when there is "intentional prosecutorial misconduct."
5 *State v. Jorgenson*, 198 Ariz. 390, 391, ¶¶ 3-4, 10 P.3d 1177, 1178 (2000).

6 CONCLUSION

7
8 On information and belief, the Probate Court has already disposed of the State's
9 filing in that Court. This underscores the facial intolerability of the State's assault, but
10 it cannot remove the damaging effect of its actions. The cumulative effect of the State's
11 pattern of misconduct, both in pretrial proceedings, but particularly in delaying the
12 resumption of trial since Judge Lindberg's illness, can be for no other reason than to
13 avoid going back to trial with this jury. Part of this behavior has been to attempt to
14 create a false conflict between Mr. DeMocker and his counsel of choice. As the Court
15 noted recently, we are nearing the point where this trial cannot resume with this jury.
16 The State's deliberate attempt to avoid resuming trial is close to success. The State
17 should not be permitted to get away with this ruse. The accusations against counsel are
18 unfounded and the conflict suggested is non-existent.

19 Counsel request that the Court declare a mistrial and dismiss the case with
20 prejudice based on the State's deliberate and intentional attempts to create a conflict and
21 delay the resumption of trial.

22 DATED this 16th day of July, 2010.

23
24 By: _____

25 John M. Sears
26 P.O. Box 4080
27 Prescott, Arizona 86302
28

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Attorneys for Defendant

ORIGINAL of the foregoing hand delivered for
filing this 16th day of July, 2010, with:

Jeanne Hicks
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

COPIES of the foregoing hand delivered this
this 16th day of July, 2010, to:

The Hon. Warren R. Darrow
Judge Pro Tem B
120 S. Cortez
Prescott, AZ 86303

Joseph C. Butner, Esq.
Jeffrey Paupore, Esq.

Prescott Courthouse basket

3210822

Friday, July 09, 2010

Prosecutors allege DeMocker benefited from victim's insurance policy

The Daily Courier

Friday, July 09, 2010

A deputy county attorney argued in court Friday that unbeknownst to the prosecution, accused murder defendant Steven DeMocker benefited from some of the \$750,000 in life insurance proceeds paid out from the victim's policies.

Prosecutors charged DeMocker, 56, with murder in the July 2, 2008, death of his former wife Carol Kennedy, contending that he beat her to death with a golf club at her Williamson Valley home. They claim that DeMocker, a stockbroker, had a financial motive for the crime.

Deputy County Attorney Joseph C. Butner III told Superior Court Judge Warren R. Darrow that the first time he learned that the Hartford Life Insurance Co. paid DeMocker's daughters, Katie, 22, and Charlotte, 18, the money from their late mother's life insurance policies was when defense lawyer John Sears alluded to it in his opening argument in June.

Hartford had at first denied the claim since DeMocker, the beneficiary, was under suspicion in his ex-wife's death. Later, DeMocker signed over the policy to his daughters in a document that Sears notarized, Butner told Darrow.

"What happened was they (the claims) were processed through the estate," Butner said. "He ultimately received a benefit of \$350,000 in violation of the terms of the testamentary trust of Carol Kennedy."

In a written motion, Butner said \$100,000 went to Sears and another \$250,000 to Osborn and Maledon, the Phoenix firm that also represents DeMocker.

"Defendant Steven DeMocker then deceived the Hartford Insurance Co. out of the \$750,000 and then manipulated the funds for his benefit through a maze of accounts held by his daughter, fiancée and parents," Butner wrote. "The jury has a right to know how the defendant, Steven DeMocker, ultimately received the life insurance proceeds from the death of Carol Kennedy. The jury has a right to know how the defendant, Steven DeMocker, persuaded his daughter, Katie DeMocker, and his fiancée, Renee Girard, to violate the terms of the testamentary trust of Carol



Les Stukenberg/The Daily Courier
Steven DeMocker smiles at his two daughters at a court hearing in January of 2009.

Kennedy and pay those proceeds to his attorneys."

The trust required the money stay in the account for the young women until they were 25 years old, Butner said. Instead, the trusteeship changed from Katie DeMocker to Girard, and funds were dispersed through DeMocker's mother, Janice DeMocker, to the defense lawyers, according to Butner.

Sears demanded that Butner say "in open court" if he alleges that Sears committed "some criminal or unethical act."

"The documents speak for themselves," Butner retorted.

Sears asked Darrow to throw out the evidence regarding the insurance policy and any witnesses that Butner might try to call to testify about it, including Sears himself, noting the state disclosed them too late under court rules.

Sears accused prosecutors of trying to smear DeMocker, his family and his lawyers with "the idea of blood money."

After the hearing, Sears called Butner's claims "really disturbing."

"This is what we think is an unfortunate effort by the state to avoid going back to trial by interjecting an issue that has no place in the case," Sears said. He pointed out that the DeMocker daughters are now adults and what they do with their inheritance is up to them.

"They believe their father is falsely accused," Sears said. "This case is about one thing and one thing only - who killed Carol Kennedy - not these collateral matters."

Reached by phone, Girard, DeMocker's girlfriend at the time of the murder, said that the DeMocker family asked her to take over as trustee for the estate from Katie DeMocker who was "burned out" and busy with her senior year at college and working two jobs.

"My only role was to transfer that money to Charlotte," Girard said. "That was my only role." When Charlotte turned 18, Girard went to the bank with her and helped her sign the money over to her grandmother.

"Their dad's life was on the line and the attorney's fees are huge," Girard said. "In their minds, they were contributing to saving their dad's life by doing that."

When asked if he knew the DeMocker family had another source of money when the county began paying for expert witnesses for the defense, Yavapai County Public Defender Dean Trebesh said a judge ordered him not to comment.

However, in a letter to the county supervisors, Trebesh said "the DeMocker capital murder case dealt us a major financial blow" and that the \$350,000 budgeted for capital cases was insufficient. Due to the DeMocker case, in which the county will pay for defense as well as prosecution expert witnesses, and another death penalty case filed against Calvin Divens, the office will spend \$946,000 more than budgeted, he wrote.

"Because of its unique and high-profile circumstances, the expenses have been frightful," Trebesh wrote.

Darrow, meanwhile, who was assigned the case after the first trial judge, Thomas Lindberg, became ill on June 17, gave the lawyers until noon Monday to file further papers about the insurance issue.

"I thought I could make a ruling to resume the trial on Thursday," Da... said. "I'm less confident of that now."

The trial has been suspended since Lindberg's illness but most of the jurors told the judge Wednesday they would be able to continue to serve.

Related Links:

October 9, 2010
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